

IN THE COURT OF APPEALS OF TENNESSEE  
AT KNOXVILLE  
August 14, 2007 Session

**KIMBERLY L. PAYNE v. MICHAEL R. PAYNE**

**Appeal from the Circuit Court for Hamilton County**  
**No. 03D1173     W. Neil Thomas, III, Judge**

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**No. E2006-02467-COA-R3-CV - FILED SEPTEMBER 12, 2007**

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This is a divorce case involving a marriage of almost thirty years between Kimberly L. Payne (“Wife”) and Michael R. Payne (“Husband”). The parties have two adult children. Wife filed a complaint for divorce based on Husband’s alleged inappropriate marital conduct. Husband filed a counterclaim also seeking a divorce, but claiming it was Wife who had engaged in inappropriate marital conduct. Following a trial, the Trial Court divided the marital property and awarded Wife alimony in futuro of \$1,800 per month. Husband appeals claiming that, pursuant to Tenn. Code Ann. § 36-5-121(f)(2), the alimony award was improper because the Trial Court failed to take into account that Wife was living with a new boyfriend who, Husband claims, was providing financial support to Wife. Husband also challenges the marital property distribution. We affirm.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the  
Circuit Court Affirmed; Case Remanded**

D. MICHAEL SWINEY, J., delivered the opinion of the court, in which HERSCHEL P. FRANKS, P.J., and SHARON G. LEE, J., joined.

Charles D. Paty, Chattanooga, Tennessee, for the Appellant, Michael R. Payne.

Jennifer H. Lawrence, Chattanooga, Tennessee, for the Appellee, Kimberly L. Payne.

## **OPINION**

### **Background**

The primary issues at trial centered around the distribution of marital property and whether Wife should be awarded alimony and, if so, the type and amount of alimony to which she was entitled. Another significant issue involved the value of a business, Winesett-Hill Constructors, Inc., of which Husband was a partial owner. Following the trial, the Trial Court entered a judgment resolving these issues as follows:

The Court finds that [Husband's] interest in Winesett-Hill Constructors, Inc., is marital property and should be valued at \$450,000.00 (Four Hundred Fifty Thousand Dollars), which reflects the Court's determination that [Husband's] 16.7% interest in Winesett-Hill Constructors, Inc., is worth \$500,000.00 (Five Hundred Thousand Dollars), less a 10% minority discount (\$50,000.00) (Fifty Thousand Dollars), less the indebtedness of \$253,000.00 (Two Hundred Fifty-Three Thousand Dollars). The Court further finds that the value of [Husband's] interest in Winesett-Hill Constructors, Inc., should be adjusted, depending on whether or not certain monies were bonused out during 2004, so as to reduce [Husband's] indebtedness and thereby increase his equity.

The court also finds that [Husband] has a 401K retirement through his employment with Winesett-Hill Constructors, Inc., valued at \$90,000 (Ninety Thousand Dollars), a marital residence with a net equity of \$65,000 (Sixty-Five thousand Dollars), proceeds from the sale of the daughter's home of \$11,000.00 (Eleven Thousand Dollars) and [Wife's] automobile with a net equity of \$10,000.00 (Ten Thousand Dollars). The parties acknowledge that [Husband] has previously paid to [Wife] the sum of \$5,500.00 (Five Thousand Five Hundred Dollars) and [Husband] therefore still owes the sum of \$5,500 (Five Thousand Five Hundred Dollars).

The court further finds that [Husband] should be awarded the stock and interest in Winesett-Hill Constructors, Inc....

The court finds that [Wife] should be awarded her automobile, \$90,000.00 (Ninety Thousand Dollars) in [Husband's] 401K retirement, the marital residence valued at \$65,000 (Sixty-Five Thousand Dollars) and the \$11,000.00 (Eleven Thousand Dollars) proceeds from the sale of the party's (sic) daughter's house.

The court further finds that [Wife] shall pay all of her debts listed in her Asset and Liability Statement including the mortgage on the marital residence and hold [Husband] harmless from any liability.

The court further finds that [Husband] is responsible for all business related debts and shall hold [Wife] harmless from any liability.

The court further finds that [Wife] is entitled to \$1,800.00 (One Thousand Eight-Hundred Dollars) a month as periodic alimony in futuro....

The court further finds that each party should pay their own attorney fees and expert expenses and the court costs should be taxed to [Husband].

The court finds that this is an equitable distribution of the assets because [Husband], while receiving more in value is receiving an asset which has very little liquidity whereas [Wife] is receiving assets which are more liquid.

As noted, the Trial Court left the exact value of Husband's interest in Winesett-Hill Constructors, Inc., open so it could be adjusted depending on "whether or not certain monies were bonused out during 2004, so as to reduce [Husband's] indebtedness and thereby increase his equity." Over one year later, the Trial Court conducted a hearing on this remaining issue and determined that Husband had received a 2004 bonus of \$92,335 and, although this money was not paid directly to Husband, it was used to reduce his indebtedness in the company stock that Husband owned. After various deductions for taxes and the like, the Trial Court concluded that the net benefit to Husband was \$59,834. The Trial Court then proceeded to award Wife one-half of that benefit, or \$29,917.

Husband appeals claiming the Trial Court erred in both the type and amount of alimony because, at the time of the divorce, Wife was living with her new boyfriend who was providing financial support to Wife. Husband also claims the marital property distribution was inequitable.

### **Discussion**

The factual findings of the Trial Court are accorded a presumption of correctness, and we will not overturn those factual findings unless the evidence preponderates against them. *See* Tenn. R. App. P. 13(d); *Bogan v. Bogan*, 60 S.W.3d 721, 727 (Tenn. 2001). With respect to legal issues, our review is conducted "under a pure *de novo* standard of review, according no deference to the conclusions of law made by the lower courts." *Southern Constructors, Inc. v. Loudon County Bd. Of Educ.*, 58 S.W.3d 706, 710 (Tenn. 2001).

Husband claims the alimony award was in error because Wife was living with her new paramour, Fred Mumm, and that the Trial Court failed to consider this fact as required by Tenn. Code Ann. § 36-5-121(f)(2). This statute provides as follows:

(2)(A) An award of alimony in futuro shall remain in the court's control for the duration of such award, and may be increased, decreased, terminated, extended, or otherwise modified, upon a showing of substantial and material change in circumstances.

(B) In all cases where a person is receiving alimony in futuro and the alimony recipient lives with a third person, a rebuttable presumption is raised that:

(i) The third person is contributing to the support of the alimony recipient and the alimony recipient does not need the amount of support previously awarded, and the court should suspend all or part of the alimony obligation of the former spouse; or

(ii) The third person is receiving support from the alimony recipient and the alimony recipient does not need the amount of alimony previously awarded and the court should suspend all or part of the alimony obligation of the former spouse.

Tenn. Code Ann. § 36-5-121(f)(2) (2005).

There was little proof offered at trial regarding whether Wife actually was “living with” Mr. Mumm, who is a retired postal worker. Wife’s brother, Courtney Lane (“Lane”), testified that his sister and Mr. Mumm were “seeing each other” and that they had spent the night at each other’s houses. Wife testified that she and Mr. Mumm spend five or six nights a week together. They also play golf three or four times a week. When Wife and Mr. Mumm go out to eat or take a trip together, Mr. Mumm usually pays for everything.<sup>1</sup> Mr. Mumm has a closet full of clothes at Wife’s house. Wife testified that she and Mr. Mumm have no immediate plans to get married.

When awarding alimony in futuro to Wife, the Trial Court specifically found that Mr. Mumm was not providing financial support to Wife. In other words, the Trial Court determined that Wife had rebutted any presumptions created by Tenn. Code Ann. § 36-5-121(f)(2)(B)(i).

For present purposes, we will assume that Wife is “living with” Mr. Mumm. The question then becomes whether the Trial Court erred when it determined that Wife rebutted the

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<sup>1</sup> As argued by Wife, not an unusual result in a “dating” relationship.

presumption that either Mr. Mumm was contributing to Wife's support, or vice versa. There was no evidence presented to the Trial Court that Mr. Mumm was paying any of Wife's monthly bills, or that Wife was paying any of Mr. Mumm's monthly bills. The most that can be said from the testimony at trial is that Wife's food expenses and vacation costs are lower because Mr. Mumm typically pays when they go out to dinner or take a trip together. The Trial Court apparently credited Wife's testimony about the nature and financial aspects of her relationship with Mr. Mumm. The Trial Court certainly could have discredited Wife's testimony on this particular issue, but the Trial Court did not do that.

In *Wells v. Tennessee Bd. of Regents*, our Supreme Court observed:

Unlike appellate courts, trial courts are able to observe witnesses as they testify and to assess their demeanor, which best situates trial judges to evaluate witness credibility. *See State v. Pruett*, 788 S.W.2d 559, 561 (Tenn. 1990); *Bowman v. Bowman*, 836 S.W.2d 563, 566 (Tenn. Ct. App. 1991). Thus, trial courts are in the most favorable position to resolve factual disputes hinging on credibility determinations. *See Tenn-Tex Properties v. Brownell-Electro, Inc.*, 778 S.W.2d 423, 425-26 (Tenn. 1989); *Mitchell v. Archibald*, 971 S.W.2d 25, 29 (Tenn. Ct. App. 1998). Accordingly, appellate courts will not re-evaluate a trial judge's assessment of witness credibility absent clear and convincing evidence to the contrary. *See Humphrey v. David Witherspoon, Inc.*, 734 S.W.2d 315, 315-16 (Tenn. 1987); *Bingham v. Dyersburg Fabrics Co., Inc.*, 567 S.W.2d 169, 170 (Tenn. 1978).

*Wells v. Tennessee Bd. of Regents*, 9 S.W.3d 779, 783 (Tenn. 1999).

Given the limited amount of proof offered at trial and the Trial Court's implicit credibility determination, we are unable to conclude that the facts preponderate against the Trial Court's conclusion that Wife successfully rebutted any statutory presumption that Mr. Mumm was contributing to her support, or that she was contributing to Mr. Mumm's support.<sup>2</sup>

The next issue involves the marital property distribution. Husband's sole argument on this issue is as follows:

In the present case, [Husband] was awarded the interest in the Winesett-Hill Construction Company. The court found that

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<sup>2</sup> Wife raises an issue claiming that Tenn. Code Ann. § 36-5-121(f)(2) does not apply to an *initial* alimony determination. Given our determination that even if the statute does apply, the facts do not preponderate against the Trial Court's conclusion that Wife rebutted the statutory presumption, we need not and do not reach this particular issue raised by Wife.

[Husband's] interest in the company was \$450,000, considering the \$253,800 debt, [Husband's] net equity in the company was \$196,200.00. The court had a rehearing pursuant to the court's ruling and the Order entered on June 13, 2005. The court ordered that further proof be introduced to determine whether or not [Husband's] interest in Winesett-Hill should be adjusted depending on whether or not certain monies were bonused out during 2004 so as to reduce [Husband's] indebtedness on said stock. After the proof at the hearing..., the court awarded [Wife] an additional \$29,917.00 as a judgment. By awarding the \$29,917.00 judgment to [Wife] against [Husband], the court, in effect, increased [Wife's] marital estate to \$184,917.00 and reduced [Husband's] marital estate to \$166,999, giving [Wife] \$20,000 more in marital assets than [Husband]. The court, in it's (sic) Memorandum Opinion, stated that [Husband] was getting very ill-liquid assets whereas [Wife] was getting the more liquid of the assets.

Husband correctly acknowledged in his brief and at oral argument that the marital property distribution must be equitable, as opposed to equal. *See, e.g., Morton v. Morton*, 182 S.W.3d 821, 833-34 (Tenn. Ct. App. 2005), wherein we stated:

A trial court has wide discretion in dividing the interest of the parties in marital property. *Barnhill v. Barnhill*, 826 S.W.2d 443, 449 (Tenn. Ct. App. 1991). As noted by this Court in *King v. King*, when dividing marital property:

The trial court's goal in every divorce case is to divide the parties' marital estate in a just and equitable manner. The division of the estate is not rendered inequitable simply because it is not mathematically equal, *Cohen v. Cohen*, 937 S.W.2d 823, 832 (Tenn. 1996); *Ellis v. Ellis*, 748 S.W.2d 424, 427 (Tenn. 1988), or because each party did not receive a share of every item of marital property. *Brown v. Brown*, 913 S.W.2d [163] at 168.... In the final analysis, the justness of a particular division of the marital property and allocation of marital debt depends on its final results. *See Thompson v. Thompson*, 797 S.W.2d 599, 604 (Tenn. App. 1990).

*King v. King*, 986 S.W.2d 216, 219 (Tenn. Ct. App. 1998) (quoting *Roseberry v. Roseberry*, No. 03A01-9706-CH-00237, 1998 WL 47944, at \*4, 1998 Tenn. App. LEXIS 100, at \*11-12 (Tenn. Ct. App. Feb. 9, 1998), *no appl. perm. appeal filed*).

We next discuss the mathematical figures discussed by Husband and assume for present purposes only that the calculations used by Husband accurately set forth the marital property distribution *prior* to the final court hearing where the value of Husband's interest in the company was altered. Husband claims: (1) Wife received marital property valued at \$155,000, which was comprised of Husband's 401K valued at \$90,000 and all of the equity in the marital residence valued at \$65,000; and (2) Husband received all of the net equity in Winesett-Hill, which was valued at \$196,200.

After the hearing where the above-figures were adjusted based on Husband's 2004 bonus, Husband correctly claims that the amount of marital property awarded to Wife was increased by \$29,917, thereby bringing her total award to \$184,917. However, with regard to Husband's net estate, he fails to take into account the overall debt reduction of \$59,834 resulting from the 2004 bonus. Husband's net award should be calculated as follows: \$450,000 total interest in Winesett-Hill less the "new" amount owed of \$193,966<sup>3</sup> and less the \$29,917 awarded to Wife, for a total net award of \$226,117, as opposed to the incorrect amount of \$166,000 as claimed by Husband in his brief. Thus, Husband's total marital property award was more than Wife's award by \$41,200.<sup>4</sup>

Even if Husband's mathematical calculations are correct, which they are not, Husband fails to explain why the marital property distribution is not equitable. The most that can be said about his argument is that he is claiming the marital property distribution it is not equitable simply because it is not equal. This is not a sufficient basis, standing alone, to alter a trial court's marital property distribution. Suffice it to say, we reject Husband's argument that the amount of marital property awarded to him was inequitable.

### **Conclusion**

The judgment of the Trial Court is affirmed, and this cause is remanded to the Trial Court for collection of the costs below. Costs on appeal are taxed to the Appellant, Michael R. Payne, and his surety.

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D. MICHAEL SWINEY, JUDGE

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<sup>3</sup> The previous amount owed was \$253,800, but the 2004 bonus eliminated \$59,834 of that total debt, for a new total of \$193,966, before taking into account that one-half of the \$59,834 was awarded to Wife.

<sup>4</sup> For reasons unknown to this Court, when calculating Wife's marital property award, Husband did not include the \$11,000 awarded to Wife from the sale of the parties' daughter's house, or the award to Wife of the \$10,000 in equity in her automobile. Our overall conclusion would not change had these amounts been included in Husband's argument.